No._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT
Petitioner

v.

RICHARD OSTROSKI
Respondent

APPENDIX

APPENDIX A

FINDING OF THE TRIAL COURT REGARDING CUSTODY FOR MIRANDA PURPOSES
(unpublished)

Court:

As far as we understand the situation on this, that he is not in custody, basically, that he is called in, and as an accommodation the Sergeant is driving him to the Barracks, and the Sergeant has indicated he doesn't know anything about the homicide in question except it is probably one of the items of routine nature that he hears, but he is not aware of anything involved in it other than Captain McDonnell was anxious to talk to the Defendant. This is our understanding of the testimony now. So –

Defense counsel:

I submit, Your Honors, that once he is put in that police cruiser on his way to the Barracks, that he was in custody, even though, according to the police officer, he called Captain McDonnell voluntarily. I think he was in custody.

Court:

The testimony seems to indicate he has his choice to either follow the cruiser to the Litchfield Barracks or to all come to the Barracks in one car. And the testimony is that it is more convenient they all go in the cruiser together. So, as far as the Court, we will allow it. Exception may be noted.

Transcript at 382-83.

APPENDIX B

INQUIRY CONDUCTED PRIOR TO RESPONDENT'S TESTIMONY AT TRIAL

MR. CONNOR: Your Honors, before I call Mr. Richard Ostroski, I would like to ask Mr. Ostroski some questions.

JUDGE DALY: Do you want him to sit on the stand up here and you can pose those?

MR. CONNOR: Perhaps we can do it here. Mr. Ostroski, I have told you on many occasions during our discussions that you have the right to remain silent, is that true?

MR. OSTROSKI: Yes, sir.

MR. CONNOR: You do not have to testify unless you wish to.

MR. OSTROSKI: Correct.

MR. CONNOR: You have a constitutional right to remain silent, and neither the State's Attorney, if you chose to remain silent, the State's Attorney cannot make any adverse comment about that to the Judges in the case, and, also, if you choose to remain silent, the Judges cannot consider that against you adversely, if you want to remain silent. I have also told you that if you do choose to testify, you can be subject to cross-examination, is that true?

MR. OSTROSKI: Yes, sir.

MR. CONNOR: And that you would be treated like any other witness who has testified.

MR. OSTROSKI: Yes, sir.

MR. CONNOR: Now, what is your wish, do you wish to testify or remain silent?

MR. OSTROSKI: I wish to testify.

MR. CONNOR: Do Your Honors have any questions to ask him at this time?

JUDGE DALY: You have thought this over, Mr. Ostroski, very thoroughly, have you?

MR. OSTROSKI: Yes, I have, sir.

JUDGE DALY: All right. And having thought it over and discussed the matter thoroughly with Mr. Connor, you have reached a decision that you have just enunciated, that you will testify in the case?

MR. OSTROSKI: Yes.

JUDGE DALY: You may call your first witness, Mr. Connor.

MR. CONNOR: I would call Mr. Richard Ostroski.

Transcript at 830-31.

APPENDIX C

OPINION OF THE SUPREME COURT OF THE STATE OF CONNECTICUT

(as reported in 42 Connecticut Law Journal, No. 51, pp. 13-16 (1981))

STATE OF CONNECTICUT *v.* RICHARD OSTROSKI

BOGDANSKI, C. J., SPEZIALE, PETERS, HEALEY and ARMENTANO, JS.

Argued April 8 — decision released June 16, 1981

Indictment charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to a three judge court, *Parskey, Daly* and *Foti, Js.;* judgment of guilty and appeal by the defendant. *Remanded with direction.*

Joette Katz, assistant public defender, with whom, on the brief, were *Jerrold H. Barnett,* public defender, and *Michael Connor, Jr.,* assistant public defender, for the appellant (defendant).

Ernest J. Diette, Jr., assistant state's attorney, with whom, on the brief, were *John M. Bailey,* state's attorney, and *Richard Maloney,* assistant state's attorney, for the appellee (state).

PER CURIAM. The defendant was indicted for the murder of a young woman in her Canton apart-

ment. After a trial before the court, consisting of a panel of three judges of the Superior Court,[1] the defendant was found guilty and sentenced to a prison term of not less than twenty-five years nor more than life. During the trial the court heard evidence and argument on the defendant's motion to suppress "potential testimony or other evidence that was obtained in violation of the constitution or laws of the United States or the State of Connecticut." In denying the motion the court orally stated that the defendant was under "apparent custodial interrogation." We remand the case for further articulation of the issue of custody so that this court can properly review the admissibility of the defendant's incriminating statements and various items of physical evidence.

During the night of April 11-12, 1977, a nineteen-year-old woman was brutally stabbed to death in her Canton apartment. When the defendant learned that Captain McDonnell of the state police wanted to talk with him, the defendant called the state police barracks at Litchfield from a telephone booth in New Milford. Because the defendant was unfamiliar with the area, a New Milford police officer was sent to the defendant's location. In his own car the defendant followed the officer to the New Milford police station. From there the defendant together with his wife and child rode in a state police car to the Litchfield barracks with a state trooper.

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[1] General Statutes § 54-82 (b) provides: "If the accused is charged with a crime punishable by death or imprisonment for life and elects to be tried by the court, the court shall be composed of three judges consisting of the judge presiding at the session and two other judges to be designated by the chief justice. Such judges, or a majority of them, shall have power to decide all questions of law and fact arising upon the trial and render judgment accordingly."

Upon arrival at the Litchfield barracks the defendant was informed that he was not under arrest. Captain McDonnell read aloud from a form listing the *Miranda* rights and the defendant read aloud the portion of the form indicating that he understood those rights and chose not to exercise them. See *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). During the ensuing conversation the defendant made incriminating statements and authorized an examination of his person and his property. The defendant was then formally placed under arrest.

The defense counsel at trial objected to the admission of the defendant's statements on fifth amendment grounds, contending primarily that the defendant had asserted his right to remain silent but the police did not then terminate the interview. Objection also was raised to the admission of certain physical evidence as being the fruit of the inadmissible confession.

In ruling that the defendant's *Miranda* rights were not violated, the trial court orally stated that the defendant was under "apparent custodial interrogation."[2] When asked by defense counsel to

[2] The trial court stated: "On April 16, 1978, [sic] the Defendant voluntarily came to the Litchfield Barracks with his wife and child, that the Defendant was under apparent custodial interrogation at the time, he was given his *Miranda* right warnings. There is a distinction in the *Miranda* warnings from the right to obtain counsel and the right to remain silent. And we are dealing with the right to remain silent in this matter here, and to terminate the custodial interrogation. There is some question with respect to the statements made in transcript as to whether or not equivocally or unequivocally the Defendant asked that the interrogation cease. If we find that there is no equivocation, then that would settle the matter there. If we find there is some question on the matter, then we proceed to whether or not there was a waiver of the rights. And as far as the Panel is concerned on it, we do find there was no violation of the *Miranda* rights involved herein, and in accordance with *State* v. *Staples*, [175 Conn. 398, 399 A.2d 1269 (1978)] we make a finding that the confession is voluntarily, knowingly and intelligently made, and may be admitted into evidence."

elaborate, the trial court described its finding of custody in these words: "[I]t is apparent custodial interrogation, he was given his rights, we focused it on the basic one that you challenged, the right to cease interrogation, that is what we came down to, and that is, I think, the nub of the whole argument that the Defendant raised, so we didn't go into superfluous matters that didn't seem to bear on this particular issue."

The ambiguity of the word "apparent" in the phrase "apparent custodial interrogation" and the trial court's own explanation of its thought processes indicate that the "finding" that the defendant was in custody at the time of his April 16, 1977 interview with the state police was merely an hypothesis which the trial court assumed in order to reach the fifth amendment issue of the protection of the defendant's right to remain silent. Whether and when a person is taken into custody is a question of fact. *State* v. *Derrico*, Conn. (41 Conn. L.J., No. 50, pp. 7, 10), cert. denied, U.S. , 101 S. Ct. 789, 66 L. Ed. 2d 607 (1980). It is the function of the trial court, not this court, to find facts. Whether or not the defendant was in custody is a critical threshold question which must be determined before we can properly review the claims made in this appeal. It is, therefore, necessary to remand this case for a further articulation of the trial court's decision on the custody issue.

On appeal the defendant renews his fifth amendment claims and for the first time also claims fourth amendment violations. He then urges suppression of his incriminating statements and certain physical evidence obtained after those violations. The defendant insists that he was unreasonably seized without probable cause at the time he left his own car at New Milford and entered the state police car for the ride to Litchfield, or at least at the time he

entered the Litchfield barracks. Although at oral argument before us the state conceded that at the time of the defendant's arrival at the Litchfield barracks there was no probable cause to arrest or detain the defendant,[3] the state argued that the defendant was not in custody during the interrogation there.

Although the fourth amendment claims were not distinctly raised at trial, the defendant has urged that these claims be considered under the "new constitutional right" branch of the exceptional circumstances doctrine of *State* v. *Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973). See Practice Book § 3063. The claimed "new constitutional right" is based on the posttrial decision of *Dunaway* v. *New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). In *Dunaway* the United States Supreme Court ruled that statements made by the defendant in the police station interrogation room were inadmissible because of their causal connection with the earlier fourth amendment violation where, without probable cause, a police cruiser was sent to find the suspect and bring him in for questioning; and although no formal arrest was made, the police admitted that they would have compelled the defendant to come with them if he had resisted. Because of the necessity to remand for a further articulation of the trial court's finding of "apparent" custody for fifth amendment purposes and in the interest of justice, we direct the trial court to include in its articulation of the custody issue a

[3] There need not be a formal arrest for fourth amendment protections to apply. *Rawlings* v. *Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980); *Davis* v. *Mississippi*, 394 U.S. 721, 726-27, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969). Because the state has conceded that there was not probable cause to arrest or detain, we need not consider what would constitute probable cause in this case. See *Dunaway* v. *New York*, 442 U.S. 200, 216, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).

consideration of the fourth amendment right to be "secure in their persons . . . against unreasonable searches and seizures." U.S. Const., amend. IV. See *United States* v. *Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); *Oregon* v. *Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977).

The supervision of a case on appeal is in the Supreme Court. Practice Book § 3096; *State* v. *McCarthy*, 167 Conn. 472, 477, 356 A.2d 165 (1975). Where "necessary to the proper disposition of the cause," this court may "remand the case for a further articulation of the basis of the trial court's decision." Practice Book § 3060D; *Powers* v. *Powers*, Conn. (42 Conn. L.J., No. 33, pp. 12, 13) (1981); *Robertson* v. *Apuzzo*, 168 Conn. 671, 337 A.2d 544 (1975), on full hearing, 170 Conn. 367, 370, 365 A.2d 824, cert. denied, 429 U.S. 852, 97 S. Ct. 142, 50 L. Ed. 2d 126 (1976); *Davis* v. *P. Gambardella & Son Cheese Corporation*, 147 Conn. 365, 367n, 161 A.2d 583 (1960). For the reasons set forth above, sua sponte we remand this case for further articulation.

With particular reference to the issue of custody as it affects the defendant's fourth and fifth amendment rights, it is ordered that the trial court file a memorandum of decision articulating the basis for its ruling which permitted the admission of evidence of the defendant's inculpatory statements and also permitted the admission of testimony and physical evidence resulting from the defendant's oral and written consent.

APPENDIX D

OPINION OF TRIAL COURT AFTER REMAND FOR FURTHER ARTICULATION
(unpublished)

ARTICULATED MEMORANDUM OF DECISION

The Supreme Court Opinion dated June 16, 1981, has set forth the preliminary details prior to defendant's arrival at the Litchfield barracks.

Defendant had contacted Captain McDonnell pursuant to a telephone conversation with his mother.

Defendant went upstairs to a room on the second floor of the barracks along with Captain Thomas McDonnell of the State Police and Sgt. Stephen Cudworth of the Canton Police Department. The interview commenced about 8:15 P.M. on April 16, 1977.

The defendant was advised of his *Miranda* rights by Captain McDonnell. Defendant was advised at least twice that he was not under arrest. Defendant indicated that he was fully aware of his rights. He had had prior experience with the police.

Defendant was not handcuffed.

Defendant's wife, Beverly, and their child were elsewhere in the barracks.

Defendant agreed to provide hair samples and to have his private physician divulge his blood type.

At first defendant was reluctant to have his motor vehicle searched, but later changed his mind.

His fingerprints were already on file with the police.

Defendant indicated on two occasions that he felt tired and would like to get going as soon as possible.

At first he felt that they would go to a motel since their motor vehicle was not at the barracks, but then wanted to return to their car and go home.

His wife Beverly was later brought into the interview room. They conversed privately. Beverly Ostroski indicated that on the morning of the homicide defendant arrived home around 2 A.M. with no blood stains. No blood stains were seen by her in their motor vehicle.

Defendant confessed in his wife's presence.

Defendant was arrested at 11:34 P.M. and was again advised of his rights. He refused to talk further and requested an attorney.

The interview was then concluded.

The purpose of the fourth amendment is not to eliminate all contact between the police and the citizenry, but to prevent arbitrary and oppressive interferences

by government officials with the privacy and personal security of individuals. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as under the constitution would require some particularized and objective justification.

We conclude that a person has been seized within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Some examples of seizure are: several officers present, a display of a weapon, a touching of the defendant, or use of language or tone of voice indicating officer's request might be compelled. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed. 2d 497, 509 (1980).

None of the aforesaid examples are applicable to our situation.

Nor does the *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed. 2d 824 (1979) appear to apply, since the police picked up the suspect even though they lacked probable cause to obtain a warrant for his arrest. Furthermore, he was taken into custody, not told that he was under arrest, and would have been restrained had he attempted to leave.

By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

However, in the present case there is no indication that the questioning took place in a context where defendant's freedom to depart was restricted in any way. He came voluntarily to the police station barracks, where he was immediately informed that he was not under arrest. He was given and repeated his *Miranda* rights. In the presence of his wife, he made his confession. At most it could be deemed a coercive environment not converted to a custodial situation. *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed. 2d 714 (1977).

We conclude that the defendant was taken into custody in the fourth amendment sense when he was placed under arrest. In this case we are not limited to recreating the scene at the police barracks from the testimony of witnesses. The taped recording of the interrogation is there for all to hear. A fair hearing of the tape reveals that the questioning was slow and methodical. The defendant was not subjected to threats or hints of threats. He answered questions freely and voluntarily. There is no point from the beginning to the end of the questioning where we can find any change in atmosphere which would justify a conclusion that his status had changed from a possible suspect freely

answering investigative questions to that of an actual suspect being subjected to custodial interrogation.

/s/
Daly, J.

/s/
Parskey, J.

/s/
Foti, J.

APPENDIX E

OPINION OF THE SUPREME COURT OF THE STATE OF CONNECTICUT (as reported at 186 Conn. 287 (1982))

STATE OF CONNECTICUT *v.* RICHARD OSTROSKI

SPEZIALE, C. J., PETERS, HEALEY, ARMENTANO and BIELUCH, Js.

The test of whether one is "seized" or taken into custody within the meaning of the fourth amendment to the United States constitution is whether, under the totality of the circumstances surrounding the "seizure," a reasonable person would believe that his freedom of movement has been restrained. A seizure effected without probable cause is unreasonable and thus violative of the fourth amendment.

This court, following the defendant's appeal to it from his conviction by a three-judge court of the crime of murder, remanded the matter to that court to determine whether the defendant had been in the custody of the state police when, during the course of a three-hour interrogation by them at their Litchfield barracks, he confessed to the murder and authorized an examination of his person and property. During the course of that three-hour interrogation, his repeated requests to leave the barracks were not granted, although he had been told that he was not under

arrest, and although, as the state concedes, he had been taken there without probable cause. Upon the trial court's determination, on the remand, that the defendant had not been in custody, the matter was again argued before this court. Because there was no probable cause to seize the defendant and because under the totality of the circumstances here his detention constituted a seizure, *held* that the trial court erred in determining that he was not in police custody during the interrogation and in admitting into evidence the incriminating statements and the physical evidence taken from him during the interrogation.

Argued October 16, 1981—decision released February 23, 1982

Indictment charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to a three-judge court, *Parskey, Daly* and *Foti, Js.*; judgment of guilty, from which the defendant appealed to this court, which remanded the case to the trial court for further articulation, and the parties have reargued the cause. *Error; new trial.*

Joette Katz, assistant public defender, with whom, on the brief, was *Jerrold H. Barnett,* public defender, for the appellant (defendant).

Ernest J. Diette, Jr., assistant state's attorney, with whom, on the brief, were *John M. Bailey,* state's attorney, and *Richard E. Maloney,* assistant state's attorney, for the appellee (state).

Speziale, C. J. During the night of April 11-12, 1977, a nineteen-year-old woman was brutally stabbed to death. The defendant was indicted for her murder and after a trial before the court, consisting of a panel of three judges of the Superior Court, he was found guilty and sentenced to a prison term of

not less than twenty-five years nor more than life. During the trial the court heard evidence and argument on the defendant's motion to suppress "potential testimony or other evidence that was obtained in violation of the constitution or laws of the United States or the State of Connecticut." The trial court denied the motion and orally stated that the defendant was under "apparent custodial interrogation." We remanded the case for further articulation of the threshold issue of custody, so that we could properly review the admissibility of the defendant's incriminating statements and various items of physical evidence. *State* v. *Ostroski*, Conn. (42 Conn. L.J., No. 51, p. 13) (1981). On remand the trial court found that the defendant was not in custody until his formal arrest following his confession. We disagree.

After the murder the defendant was identified by photograph as one who had been seen in the apartment house of the victim a few days before the killing. The police left messages with his family for him to call. On April 16, 1977, when he learned that Captain McDonnell of the state police wanted to talk with him, the defendant called the state police barracks at Litchfield from a telephone booth in New Milford. Because the defendant was unfamiliar with the area, a New Milford police officer was sent to the defendant's location. In his own car the defendant followed the officer to the New Milford police station. From there the defendant together with his wife and child rode in a state police car to the Litchfield barracks with a state trooper.

Upon arrival at the Litchfield barracks the defendant was informed that he was not under arrest.

Captain McDonnell read aloud from a form listing the *Miranda* rights and the defendant read aloud the portion of the form indicating that he understood those rights and chose not to exercise them. See *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In the course of the questioning the defendant appeared to discover, and stated, that he had done the act in a drunken, drugged state. He made incriminating statements and authorized an examination of his person and his property. The interrogation, which commenced at 8:15 p.m., was tape-recorded, and the transcription of it is a part of the record in this case. As a result of his confession the defendant was formally arrested at 11:34 p.m.

On appeal the defendant claims error in the admission of his confession and various items of physical evidence.[1] Whether the confession and physical evidence are admissible turns on the answers to two subsidiary questions: (1) whether the defendant was "seized" within the meaning of the fourth amendment to the United States constitution and article first, § 7 of the Connecticut constitution so as to invoke their protection, and, if so, (2) whether he was "reasonably" seized, that is, whether there was probable cause to seize him. *State* v. *Derrico*, 181 Conn. 151, 157–58, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S. Ct. 780, 66 L. Ed. 2d 607 (1980); *Dunaway* v. *New York*, 442 U.S. 200, 99

[1] The defendant also claims that the instructions to the grand jury violate the rule of *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), because the instruction on intent contained the following language: "Concerning the word intent, I ought to say that ordinarily men are presumed to intend the results which follow their acts." This issue has been resolved adversely to the defendant's claim by this court in *State* v. *Stepney*, 181 Conn. 268, 435 A.2d 701 (1980), and requires no further consideration.

S. Ct. 2248, 60 L. Ed. 2d 824 (1979).[3] Because the state has conceded that there was no probable cause to seize the defendant at the time he was taken to the Litchfield barracks, the only question for this court is whether the defendant was seized at the time he was taken there. We conclude that the defendant was seized at the time he was taken to the Litchfield barracks and that the trial court erred in admitting the confession and physical evidence obtained as a result of the interrogation at the Litchfield barracks on the night in question, which interrogation violated the defendant's fourth amendment protection against unreasonable seizures.

The test of whether a person has been "seized" so as to invoke the protection of the fourth amendment has been set out by the Supreme Court of the United States: "[A] person is 'seized' only when by means of physical force or a show of authority, his freedom of movement is restrained. . . . As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification. . . . We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only

[3] It should be noted that it is also necessary that acquisition of the evidence sought to be suppressed be causally related to the illegal seizure. *State* v. *Derrico*, 181 Conn. 151, 157–58, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S. Ct. 780, 66 L. Ed. 2d 607 (1980). Put another way, evidence obtained after an illegal arrest or seizure may be admissible if there is some intervening act sufficient to purge the evidence of the taint of the illegal detention. See *Brown* v. *Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975); *Wong Sun* v. *United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The state has not argued that there was such an intervening act in this case and nothing in the record before us suggests that there was such an intervening act.

if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States* v. *Mendenhall*, 446 U.S. 544, 553–54, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

Whether there has been such a seizure in an individual case is a question of fact. *State* v. *Ostroski*, Conn. (42 Conn. L.J., No. 51, pp. 13, 14) (1981). *State* v. *Derrico*, 181 Conn. 151, 158, 434 A.2d 356 (1980); *State* v. *Love*, 169 Conn. 596, 600, 363 A.2d 1035 (1975). Courts have found seizure: where a defendant "was taken from a neighbor's home to a police car, transported to a police station, and . . . would have been physically restrained if he had refused to accompany the officers"; *Dunaway* v. *New York*, 442 U.S. 200, 212, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); where a defendant "was separated from his two companions and placed in one of the police cruisers with a uniformed officer"; *United States* v. *Blum*, 614 F.2d 537, 540 (6th Cir. 1980); and where "two officers informed [the defendant], following an hour's interrogation, that he was the last person with the murder weapon before the victim's death and that they believed he knew more about the crime than he had revealed." *State* v. *Menne*, 380 So. 2d 14, 17 (La.), cert. denied, 449 U.S. 833, 101 S. Ct. 104, 66 L. Ed. 2d 39 (1980).

We conclude that when the facts of this case are measured by the above standard they constitute a seizure protected by the fourth amendment. The evidence is that when the defendant called, he asked to go in "tomorrow" but the trooper said he "should come in tonight." The defendant was not informed that he could leave at any time. He was told, "you

realize your [sic] at the State Police . . . Barracks okay, it's not a hotel or anything like that." On arrival at the Litchfield barracks, the defendant was separated from his wife and child. He had no car in which to leave because his car had been left in New Milford.

On several occasions the defendant asked to leave. The defendant said to Captain McDonnell, "I'd really like to get going as soon as possible, I'm beat." The police responded not to his request to leave, but to his reason for asking to leave: "Okay, doing a lot of driving . . . ?" and "Did you do all the driving or did the wife do some?" The defendant repeatedly pressed his request to leave. He interrupted his account of his drinking on the day of the murder with, "I'm not sure, see I'm pretty tired, you think I can go, I, I, I'm really, I'd like to terminate this thing cuz ahh any questions I answer, I prob . . . liable to, start fuckin everything up and telling you I was doing one thing, when I was doing another cuz I'm tired and I don't feel good." The police again were unresponsive, addressing only his reason for asking to leave, that he might say something incriminating, and assuring him that what he said was not incriminating: "[T]here's no crime against, ya know, telling me you were drunk." Next, the defendant said, "Can I at least get on the road pretty soon?", indicating that he thought his previous requests to go had been rebuffed, that another request to go would also be rebuffed, so he would settle for at least going "pretty soon." That request too was deflected with a response that he didn't need to go for the reason that he would have to drive because they would drive him. In response, the defendant tried yet again: "I want to go back to my car and then from there I'm gonna go, I'll go

home, I'll go home, crimidy sakes, cuz I'm so tired," and asked for an answer, "So, what do you think?" The police, again instead of answering his question, answered a different question: "I think you killed this girl Ricky."

Of course, what counts is not what the defendant believed, but what a reasonable person would have believed in view of all the circumstances. It is plain that a reasonable person would have believed that he was not free to leave in view of these circumstances: where one is summoned now, and "tomorrow" will not do; where one is separated from one's car and taken in a police car to the police barracks; where one is dependent on one's interrogators for the means to leave; where one's interrogators refuse to honor requests to leave; where one's interrogators refuse to honor a request to stop questioning; where the response to a request to see one's spouse is delayed; where the interrogation lasts more than three hours; where one's interrogators ask one's consent to search one's car to take various physical evidence; where one's interrogators say, "I think you killed this girl." We conclude that in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States* v. *Mendenhall*, supra.

Accordingly, the determination of the trial court that the defendant was not in custody is clearly erroneous. See *Pandolphe's Auto Parts, Inc.* v. *Manchester*, 181 Conn. 217, 221–22, 435 A.2d 24 (1980); *Stelco Industries, Inc.* v. *Cohen*, Conn. (42 Conn. L.J., No. 26, pp. 4, 5) (1980); Practice Book § 3060D. It was error for the court to admit the incriminating

statements and the physical evidence because they were the result of an illegal detention, the interrogation at the Litchfield barracks.

There is error, the judgment is set aside and a new trial is ordered.

In this opinion the other judges concurred.

APPENDIX F

EXCERPT FROM THE PETITIONER'S BRIEF BEFORE THE CONNECTICUT SUPREME COURT

By way of editorial comment, however, the Appellee will simply aver that the sole significant issue argued in his brief – i.e., the voluntariness of his confession – was surely of little consequence in a murder case in which the Defendant admitted that he took the life of Kim Steacy but – in a "confession and avoidance" sense – presented a defense of diminished capacity due to the ingestion of alcohol and drugs and that he was incapable of having the mental state required for the offense charged. (See Notice; Rec. p. 15). In a practical sense, therefore, the Appellant's fate hinged not on whether the three-judge panel believed his confession but, rather, the extent to which his own testimony about his diminished capacity, as well as that of his expert witnesses, was credited. Since the confession of the Defendant – at the least – suggested that he possessed a mental block against recollection of the killing of Kim Steacy and only came to realize – through gradual "flashbacks" – that he had performed the acts, the confession itself (whether involuntarily obtained or not!) could only have inured to the Defendant's benefit in his efforts to show that he was inacapable of having the requisite intent at the time of the homicide.

Within this context, any error by the court in admitting the tape and transcript of the Defendant's statement as evidence would surely be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Wilson v. Henderson*, 584 F.2d 1185, 1189 (2nd Cir. 1978).